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No. 95-1601

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES R. CARROLL AND DOROTHY A. CARROLL,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 7502 of the Internal Revenue Code, if a document that is required to be filed with the Internal Revenue Service is "delivered by United States mail," the document is deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope. 26 U.S.C. 7502(a)(1). If, by contrast, the document is "sent by United States registered mail," proof of the registration is treated as "prima facie evidence that the * * * document was delivered" to the Service, and the date of registration is then deemed to be "the postmark date." 26 U.S.C. 7502(c)(1). This case presents the following question:

Whether a taxpayer who produces evidence that he mailed a required document by ordinary, rather than registered, mail is entitled to a presumption that the document was delivered to the Internal Revenue Service in a timely manner even though the records of the Service reflect that the document was, in fact, not received.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 71 F.3d 1228. The opinion of the Tax Court (Pet. Supp. App. 1-21) is reported at 67 T.C.M. (CCH) 2995.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1995. The petition for a writ of certiorari was filed on March 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner James Carroll purchased the stock of Volunteer Distribution Co. on November 8, 1986

(Pet. Supp. App. 3). That company had previously filed federal income tax returns as an ordinary business corporation (*id.* at 7). Petitioner, however, desired to elect subchapter S status for Volunteer, which would permit the profits and losses of that corporation to be imputed to him directly and taxed on his individual return (*id.* at 3-4).[1] For a subchapter S election to be effective for the corporation's 1987 tax year, it was necessary for notice of the election to be filed with the Service on or before March 15, 1987 (Pet. Supp. App. 11).[2] See 26 U.S.C. 1362(b)(1)(B); 26 C.F.R. 18.1362-1(a). Internal Revenue Service records, however, reflect that such an election was not received from petitioner during that year (Pet. Supp. App. 6).

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[1] A corporation that has made a valid subchapter S election is generally, with some exceptions, not required to pay tax on its income; instead, the profits and losses of the corporation are imputed directly to the shareholders. An annual information return from the corporation is nonetheless required to establish, *inter alia*, "each shareholder's pro rata share of each item of the corporation" (26 U.S.C. 6037(a)). See generally *Bufferd* v. *Commissioner*, 506 U.S. 523, 526-529 (1993).

[2] The election is to be filed on IRS Form 2253, entitled "Election by a Small Business Corporation." Such an election, once made, is not revocable for any tax year after the 15th day of the third month of that year. 26 U.S.C. 1362(d)(1)(C)(i). The taxpayer is thus not permitted to wait until the end, or close to the end, of the tax year to revoke his election for that year. This prevents the taxpayer from engaging in abusive tax planning by electing subchapter S treatment only for years in which the corporation incurs losses—a practice that would benefit the taxpayer by passing only losses through to his individual return. See H.R. Rep. No. 1445, 95th Cong., 2d Sess. 104 (1978); *McClelland Farm Equipment Co.* v. *United States*, 601 F.2d 365, 367 (8th Cir. 1979) ("[T]his limitation serves to prevent taxpayers from using Subchapter S solely as a tax avoidance mechanism.").

At the conclusion of the 1987 and 1988 income tax years, the corporation filed information returns under 26 U.S.C. 6037, as if a valid subchapter S election had been made (Pet. Supp. App. 7). See note 1, *supra*. Petitioner and his wife claimed the losses of the corporation directly on their joint income tax returns for those years, as if a proper election for subchapter S treatment of the corporation had been made (Pet. App. 3; Pet. Supp. App. 2, 10).

Because the required election had not been filed, however, the Service rejected the information returns filed by the corporation for 1987 and 1988 (Pet. Supp. App. 7-8). When petitioner received the notice that the corporation's information return for 1988 had been rejected, he had his accountant send a copy of the subchapter S election to the Service. Petitioner asserted that the original of that election had been placed in the United States mails, properly addressed to the Internal Revenue Service, on January 21, 1987 (*id.* at 8-9).

b. On September 15, 1988, the Service sent a notice to the corporation that, based upon the election it had received from petitioner's accountant on September 13, 1988, Volunteer would be treated as a valid subchapter S corporation, effective January 1, 1988. That determination was based on the Service's policy of accepting a subchapter S election for a tax year, even though the election was not timely filed, when the corporation supplies a proper election in response to the Service's rejection of an information return that the corporation filed for the prior tax year (Pet. Supp. App. 8-10).

Because the Service had not received a timely subchapter S election from the corporation for 1987, however, the Commissioner disallowed the 1987

losses of the corporation that petitioners claimed directly on their 1987 return. The Commissioner also disallowed a 1987 deduction of the corporation that petitioners sought to carry forward directly onto their 1988 return. As a result of the disallowance of these losses and deductions, the Commissioner asserted a deficiency in income tax against petitioners of approximately $22,500. Petitioners sought review of the deficiency in the Tax Court (Pet. App. 3; Pet. Supp. App. 1-2, 10).

2. Section 7502 of the Internal Revenue Code provides two detailed rules for the timely filing of required tax documents:

(i) Section 7502(a)(1) provides that, if a document is "delivered by United States mail" to the Internal Revenue Service, the document shall be deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope. 26 U.S.C. 7502(a)(1).

(ii) Section 7502(c)(1) provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). It further provides that the date of registration shall be treated as if it were the "postmark date" (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)).

3. a. In the Tax Court, petitioner testified that on January 21, 1987, he signed the required election form and gave it to his secretary for mailing (Pet. App. 2; Pet. Supp. App. 3-4). The secretary testified that she prepared the form for mailing by ordinary mail, rather than by registered mail, and gave it to a messenger to take to the post office (Pet. App. 2; Pet.

Supp. App. 5-6). Although the messenger did not remember handling this particular piece of mail, he testified that he habitually took mail to the post office on the same date that it was given to him. He stated that he deposited envelopes prepared for ordinary mail, rather than for certified or registered mail, in a mail receptacle in the post office (Pet. App. 2; Pet. Supp. App. 6, 14-15).

An agent of the Internal Revenue Service testified that a thorough search of the agency's records revealed that the Service did not receive the subchapter S election that petitioner claims to have placed in the mail in 1987. He also explained that, when such an election is received by the Service, it is reviewed for completeness and the corporation is then informed by letter whether the election is in acceptable form. But, neither the election itself, nor a copy of the letter that routinely would have been sent in response to such an election if it had been received by the Service, existed in the agency's records (Tr. 74-78).[3]

b. The Tax Court concluded that the evidence offered by petitioners was sufficient to establish that the subchapter S election form was mailed to the Service on January 21, 1987. The court held, however, that the mere fact that the document was placed in the ordinary mail was not sufficient to establish that the document had been delivered to, and thus filed with, the Service (Pet. Supp. App. 11-21). The court noted that, in *Miller* v. *United States*, 784 F.2d 728 (6th Cir. 1986), and *Surowka* v. *United States*, 909 F.2d 148 (6th Cir. 1990), the Sixth Circuit—to which the appeal in the case would lie—held that only use of

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[3] This witness also acknowledged that documents are sometimes lost by the IRS (Pet. App. 3).

registered mail, under Section 7502(c)(1), permits a presumption of delivery to arise (Pet. Supp. App. 15).

Because an envelope containing the required election that was postmarked *before* the document was due was not "delivered by United States mail to the [Service]" (26 U.S.C. 7502(a)(1)), the court held that petitioners could not rely on Section 7502(a)(1) to establish timely filing (Pet. Supp. App. 16-17, 20). And, because petitioners did not mail the election by registered mail, the court held that they could not rely on the presumption of delivery permitted under Section 7502(c)(1) (Pet. Supp. App. 20-21). The court therefore sustained the deficiencies determined by the Commissioner (Pet. App. 4).

5. The court of appeals affirmed (Pet. App. 1-9). The court stated that, in *Estate of Wood* v. *Commissioner*, 909 F.2d 1155 (8th Cir. 1990), and *Anderson* v. *United States*, 966 F.2d 487 (9th Cir. 1992), the Eighth and Ninth Circuits had held that the common law presumption of delivery that arises from proof that a document was properly placed in the ordinary mail is applicable to tax documents notwithstanding the more narrow provisions of Section 7502 (Pet. App. 6-8). Under the decisions of the Sixth Circuit in *Miller* v. *United States*, *supra*, and *Surowka* v. *United States*, *supra*, however, taxpayers cannot invoke this common law presumption to establish that the Service actually received a document unless, as Section 7502(c) specifies, registered mail was used (Pet. App. 6-8).[4] Because the subchapter S election of the

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[4] Section 7502(c)(2) also permits the Secretary to authorize the use of certified mail for this purpose (26 U.S.C. 7502(c)(2)), which the Secretary has done by regulation (26 C.F.R. 301.7502-1(d)(1)).

corporation had not been "delivered" to the Service in accordance with Section 7502(a), and had not been sent by registered mail in accordance with Section 7502(c), the court concluded that the election was untimely and that petitioners were therefore liable for the deficiencies asserted by the Commissioner (Pet. App. 9).

ARGUMENT

The courts of appeals have adopted conflicting interpretations of Section 7502 of the Internal Revenue Code. These different interpretations have produced disparate results on the same basic facts. The proper application of the rules concerning the timely filing of documents with the Internal Revenue Service is a recurring matter of substantial importance to the administration of the tax laws—for those rules frequently determine the substantive outcome of tax disputes. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws. But, the facts of the present case do not present the precise issue on which the courts of appeals have disagreed. Further review of the decision in this case is therefore not warranted.

1. a. The Internal Revenue Code contains numerous filing requirements that specify a date or time by which the filing must be made. The consequences of a failure to make a timely filing are often significant. For example, a petition filed in the Tax Court after the time specified for filing in 26 U.S.C. 6213(a) may not be considered by that court. And, as is relevant in this case, a subchapter S election that is not timely filed with the Service is ineffective—thereby precluding the shareholders of the corporation from directly

claiming the profits and losses of the corporation on their individual tax returns (and requiring the corporation itself to report and pay any income tax owed from its operations). See Pet. Supp. App. 2-3; note 2, *supra*.

Prior to the enactment of Section 7502 of the Internal Revenue Code in 1954, it was well established that a statutory filing requirement could be satisfied only if the document was both actually and timely received by the "particular officer" specified in the statute. *United States* v. *Lombardo*, 241 U.S. 73, 78 (1916). This requirement has been known as the "physical delivery" rule. See *Anderson* v. *United States*, 966 F.2d 487, 490 (9th Cir. 1992). In *United States* v. *Lombardo*, 241 U.S. at 78, the Court rejected the contention that "the requirement of a statute * * * that a paper shall be filed with a particular officer, [may be] satisfied by a deposit in the post office at some distant place." The Court explained that (*ibid.*):

> [t]o so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files.

The Court further stated that (241 U.S. at 76-77) (quoting with approval the decision below in that case; citations omitted):

> Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper

> is filed when it is delivered to the proper official and by him received and filed. * * * Anything short of delivery would leave the filing a disputable fact * * *.

Under this "physical delivery" rule, a document that was timely mailed but not timely received was not to be treated as having been timely filed. *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d 266, 268 (5th Cir. 1964). Prior to the enactment of Section 7502, however, some courts had departed from the requirement of proof of "physical delivery" by holding that proof of "due mailing is prima facie evidence of receipt" that may be rebutted by actual evidence of non-receipt (*Crude Oil Corp.* v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947)); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952)). In *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d at 268, however, the court noted that, under this Court's decision in *United States* v. *Lombardo*, *supra*, "[m]ailing is not filing."

Against this background, Section 7502 was enacted in 1954 to address concerns about the effect of irregularities in postal delivery on the filing of tax documents. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A434-A435 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 615 (1954); *Bloch* v. *Commissioner*, 254 F.2d 277, 279 (9th Cir. 1958); *Sylvan* v. *Commissioner*, 65 T.C. 548, 551 (1975). Section 7502 provides two statutory exceptions to the "physical delivery" rule:

(i) Section 7502(a) addresses the requirement that the document be received in a timely manner. It applies when a document has been "delivered by United States mail" to the Internal Revenue Service on a

date "after" it was due (26 U.S.C. 7502(a)(1)) and specifies that a document thus delivered shall be deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope (*ibid.*). By its terms, Section 7502(a)(1) applies only when the document has been "delivered by United States mail" to the Service. *Ibid.* The risk that "United States mail" may *not* be "delivered" thus remains on the taxpayer under Section 7502(a)(1).

(ii) Section 7502(c), however, provides a method for the taxpayer to guard against that risk. It provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is to be treated as "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). The statute further provides that the date of registration shall be treated as the "postmark date" of the registered mail (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)). Any taxpayer may thus avoid the risk of non-delivery of ordinary mail simply by making use of registered mail and the provisions of Section 7502(c)(1).

b. In the present case, the subchapter S election form that petitioner claims to have mailed by ordinary mail on January 21, 1987, was not "delivered by United States mail to the agency" with a "postmark stamped on the cover" of the mailing envelope that was dated before the form was due (26 U.S.C. 7502(a)(1)). And, it is undisputed that petitioners did not send the election form by registered or certified mail. As the court of appeals correctly held, petitioners are therefore not entitled to relief from the "physical delivery" rule under either of the statutory

exceptions established in Section 7502. Because the subchapter S election was not delivered to the Service for filing in a timely manner in accordance with Section 7502, the belated election was ineffective and the deficiency determination was properly upheld.

2. The decision of the Sixth Circuit in this case is consistent with the prior decisions of that court in *Miller* v. *United States*, 784 F.2d 728 (1986), and *Surowka* v. *United States*, 909 F.2d 148 (1990). In those decisions, as here, the court held that Section 7502 "provides only two exceptions to the physical delivery rule for the filing of tax returns and that a taxpayer cannot invoke the judicially-created presumption that properly mailed material is received." 909 F.2d at 148; 784 F.2d at 731.[5]

The decision in this case is also consistent with the decisions of the Second Circuit in *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980), and *Washton* v. *United States*, 13 F.3d 49, 50 (1993), where that court emphasized that the document "must actually be 'delivered by United States mail' to the IRS, not merely placed in a regular United States mail receptacle" (*ibid.*, quoting 26 U.S.C. 7502(a)(1)). The Second Circuit, like the Sixth Circuit, has expressly rejected the contentions (i) that evidence of "a timely mailing of a return [by ordinary mail] constitutes a timely filing" (13 F.3d at 50) and (ii) that evidence of such mailing can suffice to

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[5] Accord, *H.S. & H. Ltd.* v. *United States*, 18 Cl. Ct. 241, 246 (1989) ("The exceptions by which a taxpayer may prove timely filing are exclusively and completely outlined in § 7502."); *United States* v. *Cope*, 680 F. Supp. 912, 917 (W.D. Ky. 1987) ("The only two exceptions to the * * * physical delivery rule are contained in § 7502.").

establish the statutory requirement that the document be "actually delivered" (599 F.2d at 46).

If the fact that a document had been sent by ordinary mail were sufficient to create a presumption of delivery, Section 7502(c) of the Code would be "strip[ped] * * * of its purpose." *Estate of Wood* v. *Commissioner*, 909 F.2d at 1163 (Lay, C.J., dissenting). There obviously would have been no need for Congress to provide that use of "registered" mail constitutes "prima facie evidence of delivery" under the detailed provisions of Section 7502(c)(1) if the use of ordinary mail were silently entitled to the same presumption. Such an interpretation of Section 7502 would not only be inconsistent with the "physical delivery" rule that preceded enactment of Section 7502 (see pages 8-9, *supra*), it would deprive Section 7502(c) of any rational meaning. The express creation of a presumption of delivery only for tax documents sent by registered mail under Section 7502(c)(1) negates the contention that such a presumption may also apply when tax documents are sent by regular mail.

3. As the court of appeals recognized in this case (Pet. App. 1-2, 6-8), however, these decisions of the Second and Sixth Circuits conflict with decisions of the Eighth and Ninth Circuits.

a. In *Estate of Wood* v. *Commissioner*, the Eighth Circuit concluded that "[t]here is no reason that a presumption of delivery should not apply against the Commissioner under section 7502." 909 F.2d at 1159. The court noted that, prior to the enactment of Section 7502, the common law presumption of delivery that arises from proof of mailing had been applied in cases involving statutory filing requirements for tax documents (see page 9, *supra*). The court reasoned

that neither the history nor text of Section 7502 reflects that Congress desired "to completely displace the common law presumption of delivery" (909 F.2d at 1160).

The court in *Estate of Wood* did not, however, adopt the rule that evidence of mailing would create a presumption of delivery under Section 7502.[6] The court stated that the text of Section 7502 reveals that "[t]he act of mailing is not significant for purposes of the statute but placement of a postmark is." 909 F.2d at 1161. The court opined that (*ibid.*)

> in section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed.

The court held that "only direct proof of postmark * * * will satisfy the requirements of the act" and concluded that, when such "direct proof of postmark" exists, it establishes "a presumption of delivery, which is rebuttable by the Commissioner." *Ibid.*[7] The court noted, in *Estate of Wood*, that the Commissioner had failed to provide "any positive evidence" to support the assertion that "he did not receive the return" (*id.* at 1157). The court concluded, on the record of that case, that the presumption of delivery had not been rebutted (*ibid.*).

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[6] Indeed, the court stated in *Estate of Wood* that "mere evidence of mailing" would not support a presumption of delivery. 909 F.2d at 1161.

[7] As Chief Judge Lay pointed out in his dissent in *Estate of Wood* v. *Commissioner*, 909 F.2d at 1162, however, "the plain language of the statute relegates the postmark to irrelevancy if the document is not delivered."

b. In *Anderson* v. *United States*, 966 F.2d at 490-491, the Ninth Circuit expressly adopted the rationale of *Estate of Wood* and expressly rejected the contrary decisions of the Second and Sixth Circuits in *Deutsch* and *Miller*. The court concluded in *Anderson* that the requisite "direct evidence" of a timely postmark required by *Estate of Wood* could be based solely on a taxpayer's assertion that "she actually saw the postal clerk stamp her document" (966 F.2d at 491). The court further held in *Anderson* that the "rebuttable presumption" of delivery created by "direct proof of a timely postmark" was *not* rebutted merely by the government's official "records of non-receipt." *id.* at 491-492. The court held that such official evidence did not rebut the presumption of delivery because the government had acknowledged that some "tax documents that had been mailed and delivered" to the Service were thereafter lost. 966 F.2d at 492.

4. Although these courts of appeals have reached conflicting interpretations of Section 7502, the present case is not an adequate vehicle for resolution of that conflict. This is because, under either of the conflicting interpretations of Section 7502 that these courts have adopted, petitioners would not prevail on the facts of this case.

In both *Estate of Wood* and *Anderson*, the courts concluded that a presumption of delivery could arise under Section 7502(a) if there was "direct proof of postmark." 909 F.2d at 1161; 966 F.2d at 491. In the present case, however, the record plainly does not contain any "direct proof of postmark." Instead, the testimony adduced by petitioners establishes, at most, that the document was placed in a mail receptacle on the premises of a post office (Pet. App. 2; Pet. Supp. App. 6, 14-15). Even under the analysis applied by the

Eighth Circuit in *Estate of Wood*—and adopted by the Ninth Circuit in *Anderson*—such "mere evidence of mailing" is not a sufficient basis for a presumption of delivery to arise under Section 7502. *Estate of Wood* v. *Commissioner*, 909 F.2d at 1161; see also *Grable* v. *IRS*, 188 B.R. 595, 596 (Bankr. W.D. Mo. 1995).

Although a clear conflict exists between the decisions of the circuits that have interpreted Section 7502, resolution of that conflict would not affect the disposition of the present case. Under the view of all of the appellate courts that have thus far addressed this issue, the evidence offered by petitioners in this case—"mere evidence of mailing"—would not provide a sufficient basis for petitioners to prevail under the statute.

The present case thus does not present the precise issue on which the circuits have divided. Further review of the decision in this case therefore does not appear warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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